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MARRIAGE NEUTRALITY: AN OLD IDEA COMES OF AGE

DOUGLAS K. CHAPMAN*

I. INTRODUCTION

John and Mary Smith¹ are a young couple married in 1985. Both hold jobs in which they earn an annual adjusted gross income of \$20,000. They had lived together as an unmarried couple during 1984, earning the same income as they did in 1985. While single, each filed an individual income tax return and each paid a tax of \$3205 or a total tax of \$6410 on their combined income.² In 1985, however, after the Smiths were married, they filed a joint return and paid a tax of \$7198³ on the same aggregate income. The obvious result is that the Smiths paid an additional \$788 in taxes simply because they got married. This increase in taxes because of marriage is known as the marriage penalty. This Article will first explore exactly when the marriage penalty exists, then examine the origin of the system which has brought about the marriage penalty, review recent proposals for reform in this area, including the most recent reform, the two-earner married couple deduction which was a part of the Economic Recovery Act of 1981, and finally, call for a proposal for reform.

II. THE MARRIAGE PENALTY

As the above example illustrates, the marriage penalty is the excess tax paid by a married couple over what would be paid by the same persons if unmarried. It is necessary, however, to identify what the marriage penalty is not, and in doing so actually illustrate that there is often a marriage bonus.

A somewhat common misconception about the marriage penalty is that marrieds pay more taxes than do singles in all situations. In fact, in those cases where a married couple's aggregate income is equal to the income earned by a single taxpayer, the married couple will pay less tax, and therefore benefit from a marriage bonus. This bonus is most clearly indicated by an example. Suppose our fictitious couple, John and Mary, had John as the sole wage earner, with Mary a nonworking spouse. John earned \$40,000 in tax year 1984. John's co-worker, Bob, is single, and also earned \$40,000 in 1984. John and Mary will pay a tax of \$7858 on their income, while Bob will pay a tax of \$9749 on his income. John and Mary receive a "bonus" of \$1891 as a benefit of marriage and the joint filing schedule. Table

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¹ John and Mary Smith are a fictitious couple.

² Tax computations are based on the tax rates applicable for tax years after 1983.

³ This figure is based on the married filing jointly tax schedule. The two-earner married couple deduction has been omitted for illustrative purposes. The Smiths could have taken a deduction up to 10% of the lesser qualified earned income under I.R.C. § 221 (1984) (passed as part of the Economic Recovery Tax Act of 1981). See *infra*, notes 68-81 and accompanying text.

I outlines the actual marriage bonus that results to a married couple when compared to a single person with equal income.

TABLE I

<u>Total Taxable Income</u>	<u>Tax For Married Filing Jointly*</u>	<u>Tax For Single Person</u>	<u>Marriage Bonus**</u>	<u>As % Decrease In Tax</u>
10,000	819	1,075	256	24%
16,000	1,741	2,231	490	22%
22,000	2,893	3,725	832	22%
28,000	4,315	5,465	1,150	21%
34,000	5,938	7,473	1,535	21%
40,000	7,858	9,749	1,891	19%
46,000	9,848	12,209	2,361	19%
52,000	12,128	14,729	2,601	18%
58,000	14,408	17,411	3,003	17%
64,000	16,848	20,291	3,443	17%
70,000	19,368	23,171	3,803	16%
76,000	21,888	26,051	4,163	16%
82,000	24,408	28,935	4,527	16%
88,000	27,000	31,935	4,935	15%
94,000	29,700	34,935	5,235	15%
100,000	32,400	37,935	5,535	15%
106,000	35,100	40,935	5,835	14%
112,000	37,904	43,935	6,031	14%
118,000	40,844	46,935	6,091	13%
170,000	66,400	72,935	6,535	9%

* This figure is calculated using only one wage earner, thereby eliminating any benefits of the two-earner married* couple deduction.

** The marriage bonus is also the singles penalty.

A review of Table I illustrates the fact that the present tax system favors marrieds in those situations where a married couple has the same aggregate income as a single taxpayer. These results are more disparate if the aggregate income of the married couple is earned by both parties.⁴ Figure I illustrates the marriage bonus or singles penalty as it is sometimes called.

Table II, however, illustrates the true marriage penalty. It is a comparison of

⁴ The § 221 deduction increases as the lesser wage earner's income increases, until it reaches the maximum deduction of \$3,000. I.R.C. § 221 (1984).

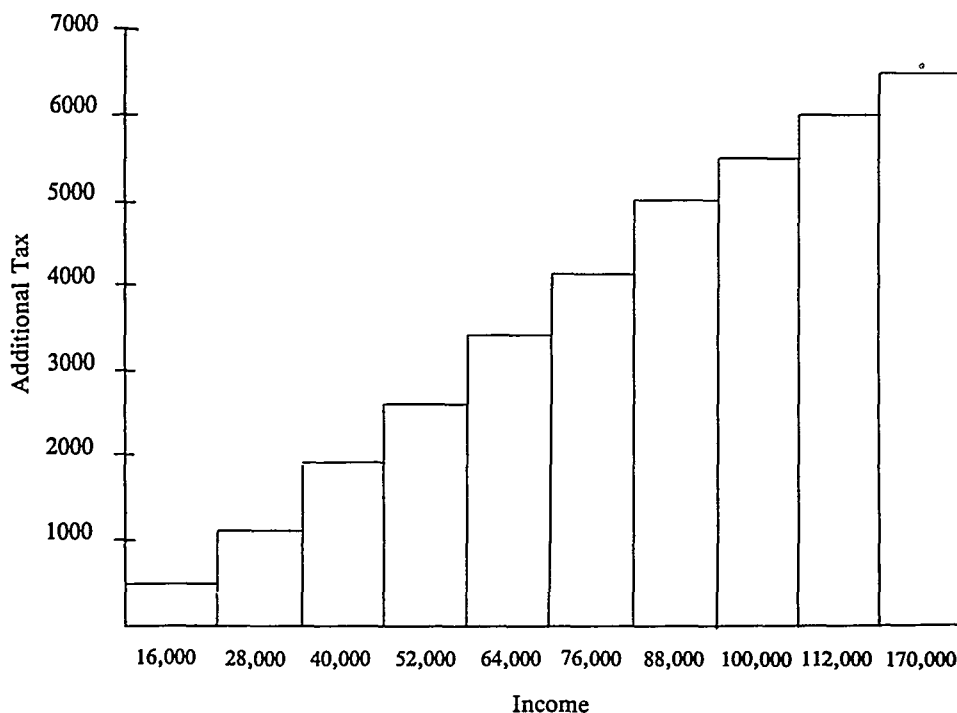


FIGURE I

Singles Penalty - Or Marriage Bonus

Additional Tax Paid by Single Person on Same Income as Married Couple

the respective taxes that a married couple would pay on the same aggregate income as two single wage earners. In Table II, all calculations are based on the premise that each member of the couple, married or unmarried, contributed equally to the aggregate income. The \$5530 excess tax paid by a married couple above the \$162,400 level of income represents the maximum marriage penalty. At that point, both the married couple and the singles are fifty percent bracket taxpayers and the tax differential remains constant.⁵ The marriage penalty, while certainly a reality when each person contributes equally to the aggregate income, lessens as the couple's aggregate income is earned disproportionately and at the point where one member is contributing approximately seventy-five to eighty percent⁶ of the couple's income, the penalty ceases and a marriage bonus again comes into being.

⁵ Once all parties are paying tax at the maximum rate of 50%, the differential will remain constant as any increase in income to either couple will result in tax of 50% of the extra income.

⁶ The actual percentage varies at different total income levels, but is consistent within this range. The variance results from the fact that different income levels put more or less income in a respective bracket.

TABLE II

Combined Taxable Income	Tax For Married Filing Jointly*	Tax For 2 Single Persons	Marriage Penalty	%Increase In Tax From Penalty
10,000	819	650	169	26%
16,000	1,741	1,520	221	15%
22,000	2,893	2,478	415	17%
28,000	4,315	3,602	713	20%
34,000	5,938	4,922	1,016	21%
40,000	7,858	6,410	1,448	23%
46,000	9,848	7,970	1,878	24%
52,000	12,128	9,730	2,398	25%
58,000	14,408	11,546	2,862	25%
64,000	16,848	13,586	3,262	24%
70,000	19,368	15,698	3,670	23%
76,000	21,888	17,978	3,910	22%
82,000	24,408	20,258	4,150	20%
88,000	27,000	22,738	4,262	19%
94,000	29,700	25,258	4,442	18%
100,000	32,400	27,778	4,622	17%
106,000	35,100	30,298	4,802	16%
112,000	37,904	32,902	5,002	15%
118,000	40,844	35,782	5,062	14%
170,000	66,400	60,870	5,530	9%

* This figure is calculated without the 10% deduction for the two-earner married couple deduction.

Figure II illustrates this phenomenon using our fictitious couple and comparing the tax they would pay on \$70,000 of income as a married couple against what they would pay as two singles, as the percentage of contribution of each member of the couple changes.

III. BACKGROUND

Because a number of commentators have previously reviewed the role marriage has played in the development of the tax structure,⁷ this Article assumes the reader's knowledge of the early development of the present system. It is sufficient here to note that the development of community property concepts provided a major impetus for Congress to enact the joint filing system in 1948. The cases of *Lucas*

⁷ See Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389 (1975); Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1, 10-24 (1980); McIntyre & Oldman, *Taxation of the Family In a Comprehensive and Simplified Income Tax*, 90 HARV. L. REV. 1573 (1977).

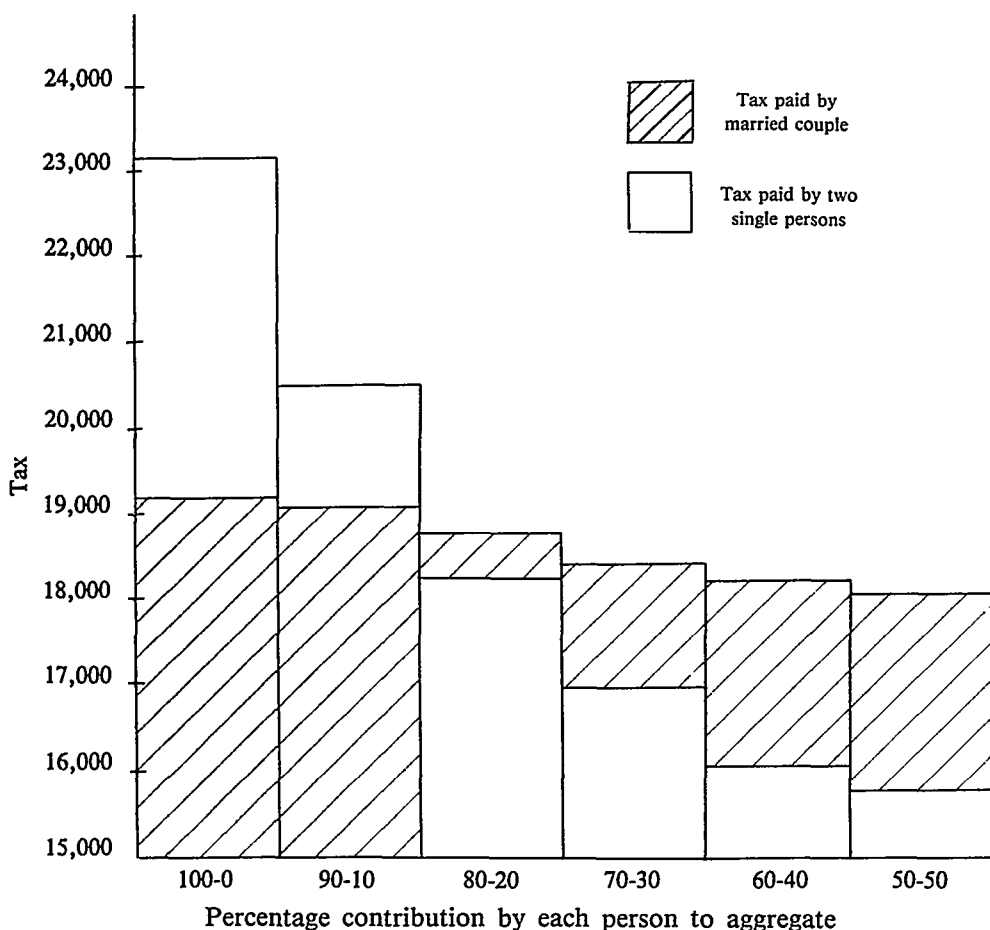


FIGURE II
Marriage Penalty

*v. Earl*⁸ and *Poe v. Sanborn*,⁹ decided by the Supreme Court in 1930, led to a

⁸ *Lucas v. Earl*, 281 U.S. 111 (1930). In this case, Earl and his wife had contracted in 1901 to treat all income earned between them as divided equally. The Court held that earned income could not be assigned by contract to avoid taxation. In the decision the Court held that the case [T]urns on the import and reasonable construction of the taxing act. There is no doubt that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skillfully devised to prevent the salary when paid from vesting even for a second in the man who earned it.

Id. at 114-15.

⁹ *Poe v. Seaborn*, 282 U.S. 101 (1930). The Court held that income could be "split" by operation of state property laws. The case was reconciled with the *Lucas* decision by distinguishing the income splitting as being by operation of state law rather than by affirmative action on the taxpayer's part. *Id.* at 117. This case was one of four test cases decided together. The other three were: *Goodell*

geographic tax anomaly that allowed taxpayers in community property states¹⁰ to enjoy the advantages of income splitting,¹¹ while denying the same to those in common law states. The impact was not initially felt by the majority of taxpayers owing to the relatively low tax rates existing at that time,¹² and to the reduced income of a substantial number of taxpayers because of the depressed economic conditions.

Because the revenue granted by these low rates was not enough to offset the expenditure burdens placed on the federal treasury by New Deal legislation and World War II, the tax base was enlarged and tax rates were increased substantially.¹³ The tax advantage accruing to couples living in community property states soon became significant and obvious.¹⁴ Although urged by the Treasury Department, Congress refused to pass any corrective legislation. As a result, some common law states adopted community property laws for federal tax purposes, thereby affording their married citizens the benefits of income splitting. By 1948, five states had already adopted some form of community property laws for tax purposes and several others were giving serious consideration to such legislation.¹⁵

Prompted by a fear that a switch to community property status would disrupt state property laws after World War II, Congress adopted a new tax schedule. This new schedule taxed married couples as if each spouse earned one-half of the aggregate income of the couple.¹⁷ The goal of national uniformity in the matter of

v. Koch, 282 U.S. 118 (1930); Hopkins v. Bacon, 282 U.S. 122 (1930); and Bender v. Pfaff, 282 U.S. 127 (1930).

¹⁰ The community property states at the time of the *Lucas* and *Poe* decisions (1930) were Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. See *Hearings on Community Property and Family Partnerships Before the House Ways and Means Comm.*, 80th Cong., 1st Sess. 834 (1947) (statement of Wesley Disney) [hereinafter cited as *Hearings of 1947*].

¹¹ Income splitting is a form of income shifting. It is a method whereby one taxpayer shifts income to a taxpayer in a lower tax bracket. "Such shifts occur generally where there is a close relationship between taxpayers [husband and wife]. Various artificial means of shifting income, including gifts, trusts, and family partnerships [and interest free loans], are used." Mess, *For Richer, For Poorer: Federal Taxation and Marriage*, 28 CATH. U.L. REV. 87, 101 n.58 (1978).

¹² "The Revenue Act of 1928 taxed the income (the equivalent of taxable income today) of every individual at a rate equal to the sum of: (1) 1-1/2 percent of the first \$4,000 of the amount of net income in excess of allowable credits; (2) 3 percent of the next \$4,000 of such an excess; and 5 percent of the remainder of such excess." Revenue Act of 1928, ch. 852, § 11, 45 Stat. 791. See Comment, *Federal Income Tax Discrimination Between Married and Single Taxpayers*, 7 MICH. J.L. REF. 667 (1974).

¹³ "For example, a married taxpayer with two dependents and an adjusted gross income of \$15,000 would have paid \$831.00 in taxes in 1939. By 1943, his tax would have been \$4,265, an increase of more than 500%." Comment, *supra* note 12, at 673 n.30 (citing *Hearings on H.R. 4790 Before the Senate Finance Comm.*, 80th Cong., 2d Sess. 92 (1948) (testimony of John Haines)).

¹⁴ *Id.*

¹⁵ The five states were Michigan, Nebraska, Pennsylvania, Oklahoma, and Oregon; Hawaii had also adopted such a law and Massachusetts and New York were considering the issue. See Mess, *supra* note 11, at 102-03 n.69.

¹⁶ Revenue Act of 1948, ch. 168, § 301, 62 Stat. 114 (1948) (now I.R.C. § 1). See also *Hearings of 1947*, *supra* note 10, at 886 (testimony of Rep. Albert Reeves).

¹⁷ *Id.*

income splitting by married couples was achieved.¹⁸ The effect of the system was to aggregate the income of the couple, then halve it and compute the tax on the two halves.¹⁹ The doubling of the tax on one-half produced an overall lower tax than would have been produced by taxing the lump sum. These savings, which resulted when one spouse earned more than one-half of the aggregate income, came to be known as the marriage bonus.

By providing for the joint return mechanism in the Revenue Act of 1948, Congress successfully ended the differential tax treatment of married couples in community property states from those in common law property states.²⁰ In doing so, however, Congress shifted the basic tax unit from the individual to the married couple.²¹ The immediate effect was to place a higher tax burden on the single taxpayer.²² From the viewpoint of the single taxpayer, the marriage bonus was in reality a single's penalty. The rationale for giving the married couple a tax benefit over the single taxpayer was never publicized prior to the enactment of the 1948 Act,²³ but was subsequently justified by recognizing the family responsibilities and additional expenses incident to a couple or family over those of an individual.²⁴

The family responsibility rationale for granting preferential tax treatment was again used in 1951 when the head of household classification was created, producing a third tax rate schedule.²⁵ This new schedule created a tax liability for qualifying single taxpayers with dependents, halfway between that of a single taxpayer and a married couple having the same income.²⁶ In 1954, the head of household provision was expanded to include single persons who maintain a parent or parents in a separate abode.²⁷

After 1954, a three part tax rate schedule was in effect with married couples enjoying the most favorable rates, followed by those classified as heads of

¹⁸ Mess, *supra* note 11, at 103.

¹⁹ Only one rate schedule existed on paper, but effectively there were two: one for joint filers; one for all the rest. STAFF OF JOINT COMM. ON TAXATION, 96th Cong., 2d Sess., *THE INCOME TAX TREATMENT OF MARRIED COUPLES AND SINGLE PERSONS* (1980) [hereinafter cited as 1980 COMM. REP.]; Gilliam, *Marital Status and Individual Income Taxation: The Equitable Issues*, 4 DET. C.L. REV. 1037, 1040 n.11 (1981).

²⁰ The effect of the joint filing provisions was to treat all income of a husband and wife as earned one-half by each.

²¹ Harmelink & Krause, *Tax Neutrality Toward Marital Status: Analysis and Proposals*, 30 U. KAN. L. REV. 51, 54-55 (1981). See also Mess, *supra* note 11, at 103-04.

²² 1980 COMM. REP., *supra* note 19, at 23.

²³ Mess, *supra* note 11, at 104.

²⁴ Bittker, *supra* note 7, at 1416-17. See also Economic Recovery Tax Act of 1981, *infra* notes 68-81 and accompanying text.

²⁵ Revenue Act of 1951, Pub. L. No. 183, ch. 521, § 301(a), 65 Stat. 452, 480 (now I.R.C. § 1).

²⁶ *Id.* Even though the head of household paid more taxes than a one-earner married couple, he or she did not have to accumulate the income of other members of the household, thus obtaining a tax break.

²⁷ Internal Rev. Code of 1954, Pub. L. No. 183, § 301, 65 Stat. 452, 482 (now I.R.C. § 2(b)(1)(B) (1984)).

households, and then single taxpayers.²⁸ The result was that the single person was shouldering a greater tax burden. In response to public pressure,²⁹ Congress finally acted to relieve some of this burden in the Tax Reform Act of 1969.³⁰

The 1969 Act created the present four tax rate schedules³¹ which became effective January 1, 1971.³² This reform was achieved by revising the single rate schedule and creating a new rate schedule titled "married filing separate returns." Married taxpayers were prohibited from using the new single rates, and were limited to using the joint filing rates, or the new married filing separate rate schedule.³³ The new single rate schedule was devised so that tax liability for a single taxpayer would never exceed by more than twenty percent the tax paid on the same income under the joint filing provisions. This contrasted with a possible difference of as much as forty-two percent under the pre-1969 Act rate schedules.³⁴ By reducing the penalty on single taxpayers instead of re-evaluating the justifications behind the joint return provisions, Congress apparently accepted the family responsibility rationale that previously had been the basis of both the joint and head of household provisions.³⁵

The Tax Reform Act of 1969, although it lessened the single's penalty, did not eliminate it, and actually created what has now become known as the marriage penalty. Under the new rate structure, as the married couple's earned income approached parity in contribution, the tax burden was greater than if the couple had chosen not to marry.³⁶ This inequity presented a unique issue to couples considering marriage. Marriage could provide a significant tax benefit if the couple would have only one wage earner, but the marriage could also generate a substantial burden if each member were to contribute to the couple's aggregate income.

Besides the two income couples who avoided the marriage penalty by living together without the formality of marriage, other two income couples resorted to

²⁸ Comment, *supra* note 12, at 677.

²⁹ *Id.* at 677 n.59.

³⁰ Tax Reform Act of 1969, Pub. L. No. 91-172, § 803, 83 Stat. 487 (now I.R.C. § 1).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ CONGRESSIONAL RESEARCH SERVICE, MONOGRAPH NO. 74-235E, MARITAL STATUS AS A FACTOR IN THE FEDERAL INCOME TAX TREATMENT OF INDIVIDUALS 8 (1974) [hereinafter cited as CONGRESSIONAL RESEARCH SERVICE]; Mess, *supra* note 11, at 105 n.82.

³⁵ See *supra* note 24 and accompanying text. The Senate noted that although some difference between tax rates of single and married persons is justified to reflect the extra expenses of married taxpayers, the existing differential of 42% could not be warranted on this basis. S. REP. NO. 552, 91st Cong., 1st Sess. 262, reprinted in 1969 U.S. CODE CONG. & AD. NEWS 2027, 2030-31.

³⁶ This is assuming one is comparing a married couple with an unmarried couple, both earning the same aggregate incomes in the same contributory ratios. The marriage penalty resulted primarily from the 1969 provision allowing limited income splitting via the reduced rate schedule for single persons while precluding the same opportunity to married persons filing separately. See Mess, *supra* note 11, at 105 n.85; CONGRESSIONAL RESEARCH SERVICE, *supra* note 34, at 13.

ingenious and resourceful methods to avoid the penalty. Because a married couple's filing status is determined at the close of the tax year,³⁷ some couples would divorce in late December, only to remarry early in January of the next year. These couples would be single on December 31, and therefore could file a single return. However, the Internal Revenue Service held in Revenue Ruling 76-225 that such divorce-remarry schemes were "sham transactions," and would not be given any effect for federal income tax purposes.³⁸

The divorce-remarry procedure was discussed in the case of *Boyter v. Commissioner*.³⁹ The Service prevailed against the Boyters, but for reasons apart from the determination of whether the divorce-remarry scheme was in fact a sham. What *Boyter* indicated, however, was a general dissatisfaction with the marriage penalty. After the 1969 Act, about twenty percent of all married couples had an income split⁴⁰ resulting in a marriage penalty.⁴¹ By 1979 that number had increased to forty percent.⁴² This increase was due to socioeconomic changes, the most notable being the increase in the number of working wives. This number increased from fifteen percent of all wives in 1940, to forty-one percent in 1970, to fifty percent in 1980.⁴³ The actual effect of the marriage penalty on the willingness of the spouse to enter the workforce has yet to be determined, but the tax consequences of two incomes hang like an economic cloud over the two income couple.

Public pressure, and some publicity from couples such as the Boyters, led Congress to take measures to reduce the marriage penalty. As a part of the Economic Recovery Tax Act of 1981,⁴⁴ Congress enacted section 221 of the Internal Revenue Code,⁴⁵ which created a deduction for married couples with two incomes. Section 221, while providing some relief to dual income married couples, demonstrates the ad hoc approach Congress has taken in response to taxpayer complaints about the unfairness of the tax rate system. In each year that Congress has enacted tax legislation, it has had the opportunity to restore equality to all classes of taxpayers. Yet in each instance Congress enacted measures which resulted in a new penalty or incomplete relief to the penalized class.

³⁷ I.R.C. § 143 (1984).

³⁸ REV. RUL. 76-255, 1976-2 C.B. 40.

³⁹ *Boyter v. Commissioner*, 74 T.C. 989 (1980).

⁴⁰ See Comment, *supra* note 12; see also *supra* note 6.

⁴¹ *Tax Treatment of Single Persons and Married Persons Where Both Spouses Are Working: Hearings Before the House Committee on Ways and Means*, 92nd Cong., 2d Sess. 74 (1972) (statement of Edwin S. Cohen, Assistant Secretary of the Treasury) [hereinafter cited as *1972 Hearings*].

⁴² *Tax Treatment of Married, Head of Household, and Single Taxpayers: Hearings Before the House Comm. on Ways and Means*, 96th Cong., 2d Sess. 16 (1980), at 19, table 4 (statement of Emil M. Sunley, Deputy Assistant Secretary of the Treasury) [hereinafter cited as *1980 Hearings*].

⁴³ *Id.* at 19 (statements of Emil M. Sunley and Senator Charles Mathias, Jr., [R.-Md.]).

⁴⁴ Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 (1981), *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 3. See *infra* notes 68-81 and accompanying text.

⁴⁵ I.R.C. § 221 (1984).

IV. REFORM ANALYSIS

Reformers have advocated three competing tax systems, each proclaimed to be equitable. They are a marriage neutral system, a marriage equal system, and a progressive system.⁴⁶ In addition to the examination of the equity of a proposed system, however, it will also be examined with respect to its impact on individual work efforts and incentive, and with respect to its administrative workability.⁴⁷

A. *Equity*

The underlying theory of a marriage neutral system is that domestic relations and federal tax laws should remain independent from one another.⁴⁸ That is, the decision to remain single or to marry should not be influenced by tax policy. Implied in this theory is that the two-earner married couple should not pay more taxes than two single persons with the same aggregate income. Also implied is that the head of household should not pay more taxes than any other one-earner married couple with the same income.

Marriage neutrality exists in a system where the individual is the basic tax unit, as was the federal system prior to 1948. The strongest argument against such a system is that it would result in a return to the geographic discrimination that initially sparked the joint return legislation.⁴⁹ This argument fails, however, if Congress enacts legislation overriding the community property laws for purposes of the federal income tax. This could take the form of a federal definition of gross income.⁵⁰

Another argument often raised against a marriage neutral system is that married taxpayers should have lower taxes than single taxpayers because of the costs of raising children. Yet, childless couples receive the same tax treatment as do couples with children. Many single parents, and single taxpayers with dependents other than children, bear similar costs as do married couples, yet they receive different tax treatment. This disparity leaves doubt as to whether single and head of household taxpayers are treated differently because they are single or because they are childless.⁵¹

It is true that, historically, married taxpayers have had increased expenses of a dependent who must be fed and clothed, but these are expenses of choice, and the demographic change in our society indicates that the majority of married couples no longer have an "extra mouth to feed."⁵² Additionally, in those marriages with

⁴⁶ Harmelink & Krause, *supra* note 21, at 57-60.

⁴⁷ *Id.* at 57. See also 1980 COMM. REP., *supra* note 19, at 4-5.

⁴⁸ Gilliam, *supra* note 19, at 1078.

⁴⁹ See *supra* notes 8-19 and accompanying text.

⁵⁰ See *infra* notes 68-81 and accompanying text.

⁵¹ Harmelink & Krause, *supra* note 21, at 58.

⁵² See *supra* notes 40-43, and accompanying text.

a single income, the nonworking spouse performs many services at no cost to the household, whereas a single taxpayer must either give up leisure time or employ someone else to perform those services.⁵³

The marriage equal system is the present tax system as applied to married couples.⁵⁴ In a marriage equal system, the couple becomes the basic tax unit, and all married couples with the same aggregate income pay the same taxes irrespective of how much each individual spouse earns. The underlying policy of the marriage equal system is that all married couples should pay equal taxes on the same aggregate income, regardless of how that income is earned.⁵⁵ This policy is in contrast to a marriage neutral system, wherein a larger tax would be imposed on the single income married couple than on the same income earned by a two income couple. For example, under a marriage neutral system, a married couple with one spouse earning \$50,000 and the other spouse earning nothing would pay higher taxes than a two-earner couple with each spouse contributing to the aggregate income. The difference in taxes becomes larger as the two-earner couple approaches a fifty-fifty contribution level. The marriage equal system seeks to eliminate the tax differential based on amount of contribution from each spouse. In doing so, however, the marriage equal system ignores the benefits contributed to the marriage by a nonworking spouse, and fails to recognize that the two-earner couple must forsake leisure and incur additional costs to secure the services provided by a nonworking spouse.⁵⁶ Both couples pay the same tax under the marriage equal system, but the actual costs are substantially different. Thus, income splitting for married couples remains the basic advantage of a marriage equal system, but it fails to provide equitably for married couples in different situations or to provide equality for single persons bearing similar responsibilities.

Although there has been much discussion recently about flat-rate tax systems and value added tax systems, it appears the present system of progressive taxation will remain. Despite many commentators' preference for a proportionate system,⁵⁷ the progressive system is too entrenched to be replaced quickly. The policy underlying a progressive system is that individuals with the greatest ability to pay should pay the greatest amount of tax.⁵⁸ One solution to reduce the present discrimination

⁵³ An argument can be made for the two-earner married couple incurring similar additional costs for household services as does the single individual. This was one of the rationales for giving the two-earner married couple a tax break in the Economic Recovery Tax Act of 1981. See *infra* notes 68-81 and accompanying text.

⁵⁴ Actually, the present system is no longer marriage equal since the passage of the two-earner married couple deduction, which treats two-earner married couples differently from one-earner married couples for income tax purposes. See *infra* notes 68-81 and accompanying text.

⁵⁵ Harmelink & Krause, *supra* note 21, at 59.

⁵⁶ See *supra* note 53.

⁵⁷ Under a proportionate tax system, all taxpayers pay taxes at the same rate regardless of income level. This system would do away with income brackets, and thus remove the chief incentive for income splitting.

⁵⁸ The policy has been expressed as follows: "Forced exactions should be levied upon various

among groups of taxpayers which would retain the progressiveness of the system, would be to widen income tax brackets so that the combined income of married couples would infrequently be subject to a higher tax rate.⁵⁹ It is generally agreed that it is possible to combine two of the three equitable systems discussed above.⁶⁰ The progressive system is compatible with either a marriage neutral or marriage equal system, while the latter two are mutually exclusive.

Recent changes in the composition of United States households imply less need to retain the married couple as the basic tax unit. The number of divorces in 1980 increased sixty-five percent from 1970, and the number of unmarried couples increased over one hundred fifty-seven percent.⁶¹ During the same period, the number of single persons increased fifty-eight percent while the number of married couples with children decreased eighteen percent.⁶² The number of two-earner married couples has increased by nineteen percent since 1970.⁶³ It is uncertain whether present tax policies have made a significant contribution to these changes, but since there has been a decrease in the number of traditional married couples, less emphasis should be placed on the married couple as the tax unit.

B. *Incentive*

An important policy factor applied to any new tax proposal is its effect on the savings and investment incentive of both the individual and the public. The way a new tax proposal would affect the individual depends upon personal preference or the marginal utility of each additional dollar of tax savings. Any predictions of the effect on individual taxpayers would, at best, be speculative.⁶⁴ However, general effects on the economy such as the effect of a tax proposal on low-income taxpayers, as compared with high-income taxpayers, or the overall effect on saving and investment,⁶⁵ can be predicted broadly. The Reagan Administration has indicated in its recent proposals for tax reduction and benefits, an intention to shift the emphasis from leisure to work, and from consumption to saving and investment.⁶⁶ This attention to the incentive effects of tax proposals adds an additional consideration to the traditional and central notion of equity in tax policy.

individuals with reference to their ability to pay." H.R. REP. NO. 1040, 77th Cong., 1st Sess. 19 (1941).

⁵⁹ See *supra* note 55. By widening or "flattening out" the tax schedules, revenue would be lost. This would have to be compensated by a tax increase making the proposal politically unattractive. See *infra* notes 95-97 and accompanying text.

⁶⁰ 1980 COMM. REP., *supra* note 19, at 4; Bittker, *supra* note 7, at 1394-96.

⁶¹ BUREAU OF CENSUS, CURRENT POPULATION REPORTS (Feb., 1980), as cited in 1980 COMM. REP., *supra* note 19, at 27-28.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Harmelink & Krause, *supra* note 21, at 60.

⁶⁵ *Id.* at 60-61.

⁶⁶ *Id.* at 61.

C. Administration

Finally, any tax reform proposal should be workable administratively. This notion involves two competing principles: any proposal should (1) permit the government to implement and operate the program in a reasonable manner, and (2) not cause undue difficulty for the taxpayer in determining his tax liability.⁶⁷ These competing principles involve a balance of semantics on the one hand, and mechanics on the other. For example, a proposal for allocation of unearned income may go a long way toward achieving marriage neutrality, but may leave the average taxpayer at a loss as to how it should be calculated. Well-drafted legislation should accomplish both administrative manageability for the government, and comprehension and workability for the taxpayer.

V. RECENT REFORMS—THE ECONOMIC RECOVERY TAX ACT OF 1981

The Economic Recovery Tax Act of 1981⁶⁸ gave taxpayers a twenty-five percent tax cut. This was the primary feature of the legislation, but for purposes of this Article, the two-earner married couple deduction⁶⁹ was the provision of interest. This provision, available exclusively to married couples filing joint returns, provided a ten percent deduction of the "qualified earned income"⁷⁰ of the lesser-earning spouse up to a maximum of \$3,000.⁷¹

Table III compares the taxes paid by married couples with and without the benefit of the two-earner deduction and indicates the impact the deduction had on the marriage penalty. Figure III graphically illustrates this impact on taxpayers.

Under the Act, the married couple is retained as the basic tax unit, indicating continued congressional acceptance of the joint return, and rejection of a return to a marriage neutral system.⁷² By enacting these provisions, Congress has indicated that it views three policies as being paramount: (1) the married couple should re-

⁶⁷ *Id.*

⁶⁸ Act of Aug. 13, 1981, Pub. L. No. 97-34, 1981 U.S. CODE CONG. & AD. NEWS (95 Stat.) 172 (Codified in several sections of 26 U.S.C.).

⁶⁹ I.R.C. § 221 (1984).

⁷⁰ The Code defines qualified earned income as:

[a]n amount equal to the excess of[:]

(A) the earned income of the spouse for the taxable year, over

(B) an amount equal to the sum of the deductions described in paragraphs (1), (2), (7), (9), (10) and (15) of Section 62, to the extent such deductions are properly allocable to or chargeable against earned income described in subparagraph (A).

I.R.C. § 221(b)(1) (1984).

⁷¹ I.R.C. § 221(a)(1) (1984). For 1982, the deduction was limited to 5% of the qualified earned income of the lesser-earning spouse up to a maximum of \$1500. I.R.C. § 221(a)(2) (1984).

⁷² The last time a marriage neutral system existed was prior to 1948 at which time the joint return provision was adopted. During the time prior to 1948, there was, however, geographic discrimination of married couples. See *supra* note 10 and accompanying text.

TABLE III

Total Taxable Income	Tax For Married Filing Jointly*	Tax For 2 Single Persons	Penalty	Penalty	Tax For Married Filing Jointly**	Tax For 2 Single Persons
10,000	819	650	169	99	749	650
16,000	1,741	1,520	221	77	1,597	1,520
22,000	2,893	2,478	415	173	2,651	2,478
28,000	4,315	3,602	713	363	3,965	3,602
34,000	5,938	4,922	1,016	540	5,462	4,922
40,000	7,858	6,410	1,448	788	7,198	6,410
46,000	9,848	7,970	1,878	1,109	9,079	7,970
52,000	12,128	9,730	2,398	1,410	11,140	9,730
58,000	14,408	11,546	2,862	1,760	13,306	11,546
64,000	16,848	13,586	3,262	2,002	15,588	13,586
70,000	19,368	15,698	3,670	2,410	18,108	15,698
76,000	21,888	17,978	3,910	2,650	20,628	17,978
82,000	24,408	20,258	4,150	2,890	23,148	20,258
88,000	27,000	22,738	4,262	2,930	25,668	22,738
94,000	29,700	25,258	4,442	3,092	28,350	25,258
100,000	32,400	27,778	4,622	3,272	31,050	27,778
106,000	35,100	30,298	4,802	3,452	33,750	30,298
112,000	37,904	32,902	5,002	3,548	36,450	32,902
118,000	40,844	35,782	5,062	3,592	39,374	35,782
170,000	66,400	60,870	5,530	4,030	64,900	60,870

* Without taking into account any allowance for the Two-Earner Married Couple Deduction.

** Taking into account the maximum allowable Two-Earner Married Couple Deduction.

main as the basic tax unit; (2) the added expenses incident to earning a second income should be recognized and partially compensated; and (3) the effect of the marginal rates on income-stacking should be reduced.⁷³

In retaining the married couple as the basic tax unit, Congress ruled out the alternative of a mandatory or optional individual return for married couples.⁷⁴ This was partially because of the complex administrative rules necessary to allocate in-

⁷³ SENATE COMM. ON FINANCE, ECONOMIC RECOVERY TAX ACT OF 1981, S. REP. NO. 144, 97th Cong., 1st Sess. 29-33, *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 191, 222-26 [hereinafter cited as 1981 S. REP.]. The wording of the House Report is exactly the same as that of the Senate Report, except that the House Report also mentions "the potential work disincentive [the marriage penalty] causes. . . ." H.R. REP. NO. 201, 97th Cong., 1st Sess. 52 (1981). See Gilliam, *supra* note 19, at 1078, 1084-85.

⁷⁴ For a discussion of the different rate schedules and methods of reporting income see *supra* notes 7-45 and accompanying text.

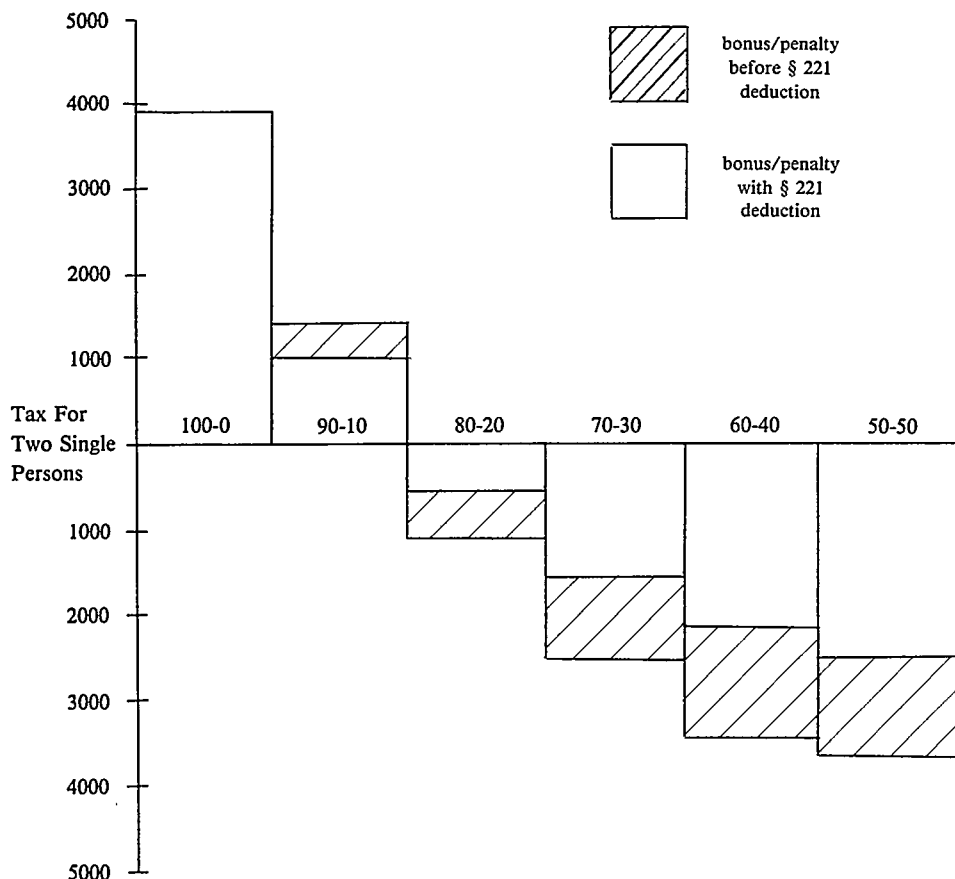


FIGURE III
Marriage Bonus/Penalty
\$70,000 aggregate income
married couple/two singles

come and deductions between spouses.⁷⁵ Additionally, the optional individual return was rejected on the grounds that such a provision would afford relief only to those couples incurring a marriage penalty,⁷⁶ whereas Congress wished to afford a deduction to all two-earner couples.⁷⁷

⁷⁵ 1981 S. REP., *supra* note 73, at 30.

⁷⁶ That is, those married couples with both spouses working and one spouse earning less than 80% of the couple's aggregate income. *See supra* note 6 and accompanying text.

⁷⁷ Included in this group would be those couples where one spouse earned more than 80% of the couple's aggregate income. *Id.*

For the first time, Congress recognized the extra expenses involved with a second spouse working and granted some relief in the form of the two-earner deduction. By reducing, but not eliminating the marriage penalty on two-earner couples, Congress has implicitly recognized that through economies of scale, a two-earner married couple is better able to pay taxes than two single persons with the same aggregate income. What Congress has failed to recognize is the number of unmarried couples living together⁷⁸ who also enjoy the advantages of economies of scale and the advantage of filing as single taxpayers. At the same time, Congress has recognized the value of the services of a nonworking spouse, unavailable to the two-earner couple, by limiting the deduction to the lesser of the two spouses' income. Implicit in this recognition is the theory that the less one spouse contributes toward the aggregate income, the more time that spouse contributes to household services. This contribution will result in the couple spending less for hiring outside help, or giving up less leisure time, and leave the couple with more dollars available to pay taxes.⁷⁹

These justifications, while individually valid, are outweighed by the consequential inequities created by the two-earner deduction. Once again, in responding to public pressure from a particular group, Congress has avoided the re-evaluation of the entire joint filing system, and instead has used ad hoc legislation for temporary relief. The enactment of the two-earner married couple deduction has created a new penalty that might be called the one-earner married couple penalty,⁸⁰ while retaining a smaller but still significant marriage penalty and a larger marriage bonus, or singles penalty. The result is that Congress has created a three level tax system which is dependent upon a working person's desire to remain single, marry a working spouse, or marry a nonworking spouse. At least, the entire system raises a question as to whether the married couple is the basic tax unit.

As to congressional concern for income-stacking,⁸¹ the two-earner married couple deduction does not eliminate the negative effects, although it does offer some relief by decreasing the harsh effects of progressivity through the deduction. (See Figure III.) Nor does the two-earner married couple deduction eliminate the marriage penalty. It does lessen the effect of the marriage penalty in those cases of two-earner married couples, but in those same cases it has the effect of increasing the singles penalty. The married couple may no longer be the basic tax unit, but neither has there been a return to the individual as the basic unit. The deduction has actually created a new one-earner married couple penalty giving the family with two incomes preferential treatment. In recognizing these discrepancies and in order to eliminate them, other reforms have been proposed. A discussion of these reforms follows.

⁷⁸ See *supra* note 61 and accompanying text.

⁷⁹ See Bittker, *supra* note 7, at 1425-26.

⁸⁰ Prior to the Economic Recovery Tax Act, the system was a married equal system, but the two-earner married couple's deduction now allows a two-earner family to pay less taxes than the one-earner family with the same aggregate income. See *supra* note 54-55 and accompanying text.

⁸¹ 1981 S. Rep. *supra* note 73, at 107.

VI. CURRENT PROPOSALS FOR REFORM

Although many proposals for tax reform, aimed at lessening or eliminating the marriage penalty or singles penalty, have been suggested in recent years, most are inadequate because they attempt to resolve one issue while ignoring another. This single-mindedness occurs because the proponent is generally trying to please a certain caucus of taxpayers. If, in fact, all penalties were eliminated, at least one group of taxpayers would pay increased taxes.⁸² The problem in achieving a policy of equity will be shown in the discussion of each proposal.

A. *Two-Earner Married Couple Credit*

This proposal is similar in effect and operation to the two-earner married couple deduction discussed above.⁸³ As proposed,⁸⁴ there would be a ten percent credit on up to \$10,000 of the income of the lesser earning spouse. The calculation of the credit, like the deduction, is relatively simple, but the two-earner credit has a serious deficiency in that it does not go to the root cause of the marriage penalty or the singles penalty, and it offers relief in arbitrary amounts.⁸⁵ At best, the credit would eliminate or reduce the marriage penalty on lower income couples while offering little relief to the higher income couples, where the relief is most needed.⁸⁶ For example, a couple whose aggregate income earned equally is \$20,000 would receive the same actual tax savings as would a couple whose aggregate income was \$50,000, earned equally. In both cases, the couple would be entitled to the maximum credit of \$1000; but, for the \$20,000 couple it would reduce taxes by approximately forty-one percent, whereas for the \$50,000 couple the tax savings would be only nine percent. In contrast, the two-earner deduction gives a tax benefit on the marginal rate of tax, therefore it produces more tax savings as a couple moves higher into the tax brackets. For example, a married couple in the sixteen percent bracket could receive a tax savings of \$128 on a maximum deduction of \$800, while a fifty percent taxpayer could receive a tax savings of \$1500 on a maximum deduction of \$3000.⁸⁷ The deduction is fairer in the sense that it provides more tax savings

⁸² Mess, *supra* note 11, at 107.

⁸³ See *supra* notes 68-81 and accompanying text.

⁸⁴ H.R. 6798, 96th Cong., 1st Sess. (1979).

⁸⁵ Moerschbaecher, *The Marriage Penalty and the Divorce Bonus: A Comparative Examination of the Current Legislative Tax Proposals*, 5 REV. OF TAX'N OF INDIVIDUALS 133, 141 (1981).

⁸⁶ Because the credit only reduces, but does not eliminate, the marriage penalty, there will be some married taxpayers who would receive little benefit from the relief offered. The least amount of relief would be realized by those taxpayers who have the highest marriage penalties; that is, those taxpayers in the higher brackets. See *supra* Table II.

⁸⁷ These figures are reached as follows: The maximum deduction for a married couple in any one tax bracket for joint returns is 10% of one-half the maximum income allowed in that bracket. One-half of the maximum income is used because the largest deduction results when each spouse earns 50% of the couple's aggregate income. The tax benefit is determined by multiplying the maximum deduction by the marginal rate of tax in that bracket.

Thus, the maximum income allowed in the 16% bracket is \$16,000. Ten percent of one-half is \$800. An \$800 deduction at the 16% marginal rate produces a tax savings of \$128.

as the aggregate income rises, whereas the credit remains constant above a combined income of \$20,000. Since the marriage penalty increases as a couple progresses into the higher brackets, the deduction offers more relief to higher income taxpayers.

In addition, the two-earner credit, like the two-earner deduction, creates the new one-earner marriage penalty.⁸⁸ It also increases the singles penalty by adding a second bonus to those couples who are receiving a marriage bonus.⁸⁹ There seems to be little in favor of such a proposal because it fails to resolve inequities and provides less actual relief than does the two-earner deduction.

B. Full Assignment of Income

This proposal would allow a taxpayer to shift income to persons in lower income tax brackets.⁹⁰ Effectively, the result would be to overrule the long standing holding in *Lucas*⁹¹ that earned income cannot be assigned until after the earner had rights to it,⁹² and therefore the tax liability for it. Adoption of this proposal would encourage many types of income shifting devices,⁹³ defeat the underlying purposes of the progressive tax system,⁹⁴ and result in a severe loss of revenue. Since such a system would cut so deeply into well-rooted policies in our tax system, serious consideration is doubtful.

C. Flattening the Rate Schedule

This proposal⁹⁵ would widen the marginal tax brackets thereby virtually, if not completely, eliminating singles or marriage penalties. The widening of the brackets produces a reduction in penalties through fewer and less extreme differences in the brackets of respective taxpayers. For example, the widening of brackets to include \$25,000 to \$30,000 per bracket with a ten percent increase from bracket to bracket would significantly reduce any marriage penalty.⁹⁶ Under such a system, a couple in which each member earned \$15,000 before and after marriage would pay the same taxes after marriage because they would not have moved into a higher bracket from combining their incomes. A penalty would still exist for those whose combined income happened to push them into the next bracket after marriage, but the number of cases where marriage resulted in a penalty would be substantially reduced. If both singles and joint filers had the same rate schedules, the singles

⁸⁸ See *supra* note 80 and accompanying text.

⁸⁹ The first bonus occurs in those two-earner couples where one spouse earns more than 80% of the aggregate income of the couple. See *supra* note 6 and accompanying text.

⁹⁰ Rothblum, *Tax Equity Between the Married and Single: Solutions, Causes, Problems*, 4 TAX NOTES 13 (1976); Mess, *supra* note 82, at 108.

⁹¹ *Lucas*, 281 U.S. 111. See *supra* note 8 and accompanying text.

⁹² Note that the *Poe* decision qualified *Lucas* by allowing assignment of earned income by operation of law. See *supra* note 9 and accompanying text.

⁹³ See *supra* note 11 and accompanying text.

⁹⁴ See *supra* notes 57 & 58 and accompanying text.

⁹⁵ See Harmelink & Krause, *supra* note 21, at 64.

⁹⁶ *Id.*

penalty would also be effectively eliminated, so that a single person earning \$25,000 would pay the same tax as a one-earner married couple or a two-earner married couple earning the same aggregate income.

The major drawback to this proposal is that by requiring fewer and much wider brackets, it would cut deeply into the well-founded principles of progressivity. The immediate result is loss of revenue unless the lower bracket rates are increased substantially, or the differential from one bracket to the next is increased substantially.⁹⁷ In the latter case, such increases return the system to one which has the potential to create serious marriage penalties, thus defeating the goal of the changed system.

D. *Optional Separate Filing*

This proposal would allow married couples the option of filing either under the joint taxpayer schedule or under the single taxpayer schedule.⁹⁸ The effect would be to give all married couples the option of figuring their taxes under each schedule and then paying the smaller total tax.

Like most proposals for reform, the optional separate filing eliminates one penalty, while aggravating another. Because two-earner couples could opt for single taxpayer filing,⁹⁹ where it would be more advantageous than joint filing, the marriage penalty is effectively eliminated. However, the singles penalty remains intact and is even increased in certain situations. A married couple with an aggregate income of \$25,000 of which \$15,000 is earned by one spouse and \$10,000 by the other, pays \$3565 in taxes under the joint schedule.¹⁰⁰ A single taxpayer also having an income of \$25,000 has a tax liability of \$4565 under the singles rate schedule, or a singles penalty of \$1000. Under the optional separate filing proposal, the single taxpayer's tax liability will not change, but the married couple could use the singles rate schedule producing a total tax of \$3076¹⁰¹ or a singles penalty of \$1489, an increase of \$489.

It is clear that this proposal, while achieving marriage equality, fails to achieve marriage neutrality by retaining a singles penalty or marriage bonus. The proposal partially abandons the concept of the married couple as a basic tax unit by leaving the choice to the taxpayer, but fails to offer any relief to the single taxpayer.¹⁰² Additionally, this system creates a new problem of proper allocation of unearned

⁹⁷ *Id.*

⁹⁸ This option was proposed by Millicent Fenwick. *See also* H.R. 3609, 96th Cong., 1st Sess. (1979); H.R. 1700, 97th Cong., 1st Sess. (1981).

⁹⁹ *See supra* notes 2 & 3 and accompanying text.

¹⁰⁰ Tax determined using the rate schedules for 1984.

¹⁰¹ This amount is determined using the single rate on \$10,000 (\$1075) added to the tax on \$15,000 (\$2,001).

¹⁰² This could be resolved by allowing single taxpayers the option of using the joint rates. *See*

Harmelink & Krause, *supra* note 21, at 61-62.

income and allocation of deductions between married couples. A resolution of the matter would require extensive legislation.¹⁰³ Overall, this proposal helps some two-earner couples at the expense of the single taxpayer. A better proposal, although somewhat similar, is considered next.

E. *Mandatory Separate Filing for All Taxpayers*

This reform would tax every person as an individual.¹⁰⁴ The individual would once again be the basic tax unit, just as the system was structured prior to 1948. Thus, there would be only one rate schedule, and all the penalties that have arisen since 1948 would be eliminated. The marriage penalty and singles penalty or marriage bonus would disappear as would the recently created one-earner married couple penalty. Such a system would be marriage neutral since there no longer would be any tax advantage to being married or single.

While a return to the pre-1948 system would eliminate the above mentioned penalties, the earlier problem of geographic discrimination would reemerge.¹⁰⁵ Those married couples in states with community property laws would receive the tax advantage of income splitting¹⁰⁶ unavailable to similar couples situated in common law property states. A solution to this unfair result is congressional legislation overriding the community property laws for federal income tax purposes.¹⁰⁷ Problems of allocation of unearned income and tax deductions and credits would be handled in the same manner.¹⁰⁸

An immediate and very recognizable disadvantage of such a proposal, apart from its failure to achieve marriage equality, is the loss of the marriage bonus to those married couples in common law states.¹⁰⁹ About twenty-six percent of all individual tax returns would lose the bonus, affecting some 46,000,000 taxpayers.¹¹⁰ These taxpayers would not feel any loss, or any loss could be lessened, if the current joint rates were retained or lowered.¹¹¹ Ideally, such a change in the rates would be phased in with the change to a separate return system.

¹⁰³ See *infra* notes 116-22 and accompanying text.

¹⁰⁴ As embodied in H.R. 2553, 96th Cong., 2d Sess. (1980), sponsored by Larry P. McDonald (D-Ga.). This bill would use the current joint return rate.

¹⁰⁵ See *supra* notes 7-19 and accompanying text.

¹⁰⁶ See *supra* note 11.

¹⁰⁷ This is discussed in detail under the Proposal for a Federal Definition of Income, *infra* notes 116-22 and accompanying text.

¹⁰⁸ This notion is discussed under the Article's recommended solution, *infra* notes 123-29 and accompanying text.

¹⁰⁹ This disadvantage would also be felt by married couples in community property states if federal legislation overriding state property laws for tax purposes is enacted. See *supra* note 107.

¹¹⁰ Figures based on 1979 data. See Gilliam, *supra* note 19 at 1092-93 n.234.

¹¹¹ The only situation in which a marriage bonus couple would feel a loss under the proposal is where the new tax rate is greater than the joint rate at the time of legislation. In answer to that argument, couples had a bonus to begin with, and as such are merely losing the bonus.

An argument could be made that married couples still realize a bonus over single taxpayers in that they aggregate their living expenses, thereby enjoying some benefit from economies of scale. This benefit, however, would extend to any group of individuals sharing living costs. Thus, the system would still achieve overall marriage neutrality. Another consequence to be considered is that one-earner families would carry a greater tax burden than single persons or two-earner families because no reduction in taxes occurs because of any additional family members for which one-earner families must provide. The single person or the second working spouse has this benefit built into the system.¹¹² This consequence could be remedied, as mentioned above,¹¹³ through legislation allowing additional personal exemptions, deductions, and credits. Conversely, the one-earner couple recognizes tax free imputed income from household services provided by the nonworking spouse,¹¹⁴ thus, justifying some additional tax burden for such couples. On the positive side, the mandatory singles filing requirement would benefit approximately 29,000,000 taxpayers currently burdened by the marriage penalty.¹¹⁵ The extent of any benefits would depend upon what new tax rate would be applied as a result of adoption of this system.

The proposed reform would provide for an overall beneficial incentive effect by encouraging all taxpayers to work more and to make economic decisions based upon criteria other than their marital status. In eliminating the marriage penalty, any disincentive for the second spouse to work is effectively eliminated or lessened. From a moral perspective, the proposal eliminates the current incentive for single persons to cohabitate in order to avoid the marriage penalty. The problem is that without supplemental legislation, a mandatory individual filing proposal would not be efficient in achieving tax equity. Although both the marriage and singles penalties would be eliminated, geographic discrimination would reappear, thus defeating the goal of marriage equality.

F. *Federal Definition of Income*

A proposal to enact a federal definition of income serves no purpose unless, in addition, a mandatory system for individual separate filing¹¹⁶ is readopted.¹¹⁷ This definition would override the community property laws for tax purposes. In reality, this is not a radical approach to taxation as there are already many Internal Revenue Code sections that override the community property laws.¹¹⁸ However,

¹¹² These benefits include business related deductions, various credits, etc.

¹¹³ See *supra* notes 106-07 and accompanying text.

¹¹⁴ See *supra* notes 52-55 and accompanying text.

¹¹⁵ This conclusion is based on 1979 figures. See 1980 COMM. REP., *supra* note 19, at 48-49. The actual number of people experiencing the marriage penalty probably went up after 1979, as more women and second spouses entered the job market.

¹¹⁶ See *supra* notes 104-15 and accompanying text.

¹¹⁷ See *supra* notes 107-08 and accompanying text.

¹¹⁸ See, e.g., the two-earner couple deduction codified in I.R.C. § 221(b) which states, "The amount

in light of the current administration's policy of the "New Federalism,"¹¹⁹ the major obstacle to this reform would be the political reluctance to take control away from the states through federal intervention.

The basic objective of federal definition of income for tax purposes would be to end the geographic discrimination that would exist between married couples living in community property states and those living in common law states if the joint filing system were removed.¹²⁰ Thus, income would be attributed to the person who earned it, and each wage earner would be responsible for filing his or her tax return and paying the taxes due. A problem would exist with unearned income and the proper allocation between taxpayers. One suggestion has been that investment income could be allocated to the owner of income-producing property.¹²¹ However, the single taxpayer might argue that this is unfair because such a policy would result in income-splitting of unearned income. It is important to note, however, that there are certain risks associated with the transference of income-producing property. Should the couple ever divorce, it is likely the original transferor would be unable to recover the property. Notwithstanding the risk factor, a single taxpayer can also enjoy the benefits of income-splitting from the transference of investment property into the name of another.¹²² The recommended proposal for a federal definition of income is a highly desirable reform only when accompanied by a mandatory individual filing proposal.

VII. A RECOMMENDATION

The goal of equal taxation of equal income, and taxation by ability to pay cannot be achieved by allowing Congress to continue on its present path of ad hoc reform aimed at the appeasement of the current loudest voice of protest. As recent history confirms, such an approach results in the creation of new penalties, incomplete correction of old penalties, and a growing body of complex rules to govern the system. The surest way to achieve tax equity is through a reevaluation of the joint return provisions. Such a reevaluation clearly indicates the desirability of a mandatory individual filing system for all taxpayers,¹²³ a federal definition

of qualified earned income shall be determined without regard to any community property laws." See also, I.R.C. § 402(e)(4)(a)(G).

¹¹⁹ The concept of "new federalism" encompasses the notion that powers exercised by the federal government should be returned to the state and the people. The Reagan Administration has championed the cause of new federalism, and has made it a priority issue. As President Reagan explained in his inaugural address, "It is my intention to curb the size and influence of the Federal Establishment and to demand recognition of the distinction between powers granted to the Federal government and those reserved to the states or to the people. All of us need to be reminded that the Federal government did not create the states; the states created the Federal government." Inaugural address by President Ronald Reagan (January 20, 1981), reprinted in XCVII Vital Speeches 258-60 (1981).

¹²⁰ See *supra* notes 105-06 and accompanying text.

¹²¹ Harmelink & Krause, *supra* note 21, at 65.

¹²² E.g., an irrevocable inter-vivos trust which expires ten years and a day after it takes effect would suffice. Such trusts are known as *Clifford* trusts, so named after a case involving the validity of such a trust for tax purposes. *Helvering v. Clifford*, 309 U.S. 331 (1939).

¹²³ See *supra* notes 104-15 and accompanying text.

of income for all taxpayers,¹²⁴ and a coordinated phasing in of such a system with the appropriate rate reduction.

Such mandatory filing would return the system to the pre-1948 status before any marriage penalty or bonus existed. The individual again would become the basic tax unit. Geographic discrimination, a major problem facing Congress in the pre-1948 tax system, would be eliminated through legislation overriding the community property laws for tax purposes. Implementation of this reform legislation in conjunction with a tax reduction would lessen the impact of this change on married couples who are presently enjoying the benefits of income splitting.¹²⁵ Coincident with the mandatory filing system and federal income definition legislation, should be specific legislation detailing the proper method for allocating deductions, credits, and unearned income between taxpayers.¹²⁶ Deductions and credits allocable to earned income present no problem as they are attributable to the person generating the deduction.

The result would be a system of taxation that is marriage neutral, and still satisfies the desire for a progressive system of taxation. The tax differentials that remain in the system will not be determined by a taxpayer's choice to remain single or to marry. All taxpayers would be entitled to the economies of scale incident to shared housing, whether they chose to marry or not. The important consequence, and the one that appears to have been lost through the years, is that each taxpayer who earns a specific amount of income in a given year will face the identical potential¹²⁷ tax liability. A taxpayer will be no better or worse off for tax purposes, whether he or she has chosen to remain single or has opted for marriage.

The adoption of a marriage neutral system can only occur when Congress ceases to recognize marriage equality as a primary goal of the tax system.¹²⁸ In a society that has shifted from a majority of one-earner couples to a growing majority of two-earner couples,¹²⁹ it is unrealistic and unfair to continue to strive for marriage equality. Every individual, whether married or single, should face the same tax liability on the same amounts of income.

VIII. CONCLUSION

The present approach to the taxation of married couples, which combines the progressive and marriage equal systems, is no longer a desirable one. The adoption of the two-earner married couple deduction has altered the present system so that it is no longer marriage equal. The result is that we have a system that is progressive, but neither marriage equal nor marriage neutral.

¹²⁴ See *supra* notes 106-22 and accompanying text.

¹²⁵ See *supra* notes 109-12 and accompanying text.

¹²⁶ These suggestions and the following allocation of deductions were suggested in Harmelink & Krause, *supra* note 21, at 66.

¹²⁷ Taxpayer's actual taxes will still vary according to the allowable exemptions, deductions, and credits; but absent these allowances each taxpayer earning a specific amount will pay identical taxes.

¹²⁸ See *supra* notes 46-58 and accompanying text.

¹²⁹ See *supra* notes 61-63, and accompanying text.

The increase of two-earner married couples has brought about the need to reevaluate and change the method used to tax married couples. Marriage equality, once a desirable goal, should be abandoned in favor of a more equitable goal of marriage neutrality. Recognizing that true marriage equality and marriage neutrality are inconsistent goals, Congress has for over thirty years chosen to pursue marriage equality. Through a long and tortuous path of ad hoc remedies, the system has developed into one which fails at both equality and neutrality.

Marriage neutrality, long ignored as an appropriate basis for taxing married couples, should be reestablished as the fundamental principle underlying our income tax system. Through the adoption of a mandatory separate filing system operating with only one rate schedule for both singles and each member of a married couple, Congress should eliminate the major inequities that have come to plague the present system. Additional legislation would be required to overcome the inequities caused by the operation of community property laws and to apportion unearned income, but the resulting system would be marriage neutral. Thus, all taxpayers would be treated equally for income tax purposes. The inequities rampant in the present system would give way to an equitable system. It is time for Congress to recognize and respond to a clear shift in the traditional married couples' earning patterns and respond with a comprehensive remedy as opposed to makeshift, half-way measures.